

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 510 of 1992

with

CRIMINAL APPEAL No 592 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT

and

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : YES
5. Whether it is to be circulated to the Civil Judge? : NO

AFZALKHAN MOHMADNBI PATHAN

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 510 of 1992
MR MJ BUDHBHATTI for the appellants.
MR KP RAVAL, APP, for Respondent No. 1
2. Criminal AppealNo 592 of 1992
MR KP RAVAL, APP, for the appellant.
MR JM BUDHBHATTI FOR MR SURESH M SHAH for
Respondents

CORAM : MR.JUSTICE J.N.BHATT
and
MR.JUSTICE J.R.VORA

Date of decision: 08/08/2000

ORAL JUDGEMENT (Per J.N.Bhatt, J.)

Since both these appeals raise common questions and arise out of one judgment and order, upon request, they are being disposed of, by this common judgment. Criminal appeal No.510/92 is filed by the appellants, original accused Nos.1 to 4, under section 374 of the Code of Criminal Procedure, 1973 (Cr.P.C.) which is, hereinafter, referred to as first appeal, and appellants Nos.1 to 4, therein, are, hereinafter, referred to, as A-1 to A-4, whereas, Criminal Appeal No.592/92, acquittal, filed by the State of Gujarat, against respondents Nos.1 to 4, who are original accused Nos.5 to 8, under section 378 of the Cr.P.C., which is referred to, as the second appeal, and the respondents, therein, are referred to, as A-5 to A-8, for the sake of convenience and brevity.

Incidentally, it may be mentioned, at this stage, that, initially, three appeals were directed to be heard together, but it is stated that Criminal Appeal No.565 of 1992 filed by the State has been disposed of as dismissed on, 18th December, 1992.

A conspectus of short, but relevant, facts of the prosecution case giving rise to this group of these two appeals may be articulated, at first, with a view to examine the merits of the appeals and challenge against them.

On 3.9.90, at about 3.00 p.m. near Saiyed Dargah, behind Burfiwala Hall in Khanpur, Ahmedabad City, an incident occurred in which one Anvarhusen, sustained several serious injuries and succumbed to the same on the spot and his mother Aminabibi, sustained serious injuries. It has been the prosecution case that all the accused persons, A-1 to A-8 had formed an unlawful assembly, the common object of which was to commit murder of said Anverhusen and also to make an attempt to commit murder of injured Aminabibi.

As per the prosecution case, A-1 and A-2 were armed with knife, A-3 and A-4 were armed with gupti, whereas, A-6 was armed with dharia. Deceased had sustained, as many

as, 31 injuries, whereas, injured Amina had sustained one injury, which was possible by infliction of knife.

The deceased Anvarhusen was a champion boxer of the State and he was a headstrong person also. He was, by illegal means, taking away the huts and even in case of transfer of any hut in the area in which the deceased was residing, near the venue of offence, the person was required to obtain his permission. He had, as such, created an atmosphere of terror that nobody was willing to make any transaction in respect of huts against the wish of the deceased, who was, also, branded not only a boxer, but also a bully. Deceased Anvarhusen was also detained twice, under MISA. Not only that, he was externed from the city of Ahmedabad and he was also involved in various offences of assaults and violation of Prohibition Act. A-4, Mohmadarif had started an iron scrap business outside Madresa, without consulting or taking permission of deceased Anvarhusen, as a result of which, he invited the wrath of deceased and became his enemy. Deceased also given threats to A-4 to vacate the premises. Despite that, A-4, continued his business.

On account of enmity, deceased Anvarhusen and his brother had assaulted A-4, Mohmadarif, by inflicting gupti on various parts of his body, including abdomen and the same was reported to the Police, as a result of which, FIR was recorded, and thereafter, criminal trial was commenced. It has not been brought on record as to what was the outcome of the said trial. However, it is not in dispute that the deceased Anvarhusen was a headstrong criminal and he was known for his hard-hitting and illegal activities.

On the day of incident, around 3.00 p.m., accused persons collected near the venue of offence and assaulted the deceased and in an attempt to save him, his mother Aminabibi has also sustained injuries. The prosecution case runs further revealing that A-6, Khamarunisha, was armed with an axe. She is the sister of A-1. A-7 is the wife of A-1. A-1 and A-7, spouses, with family, were staying in one of the huts since more than two years prior to the occurrence of the incident. The said hut was purchased by A-8, Bismillabibi, for Rs.10,000/- and it was done without the previous permission of deceased Anvarhusen. Obviously, therefore, this act in permitting A-1 and A-7 to stay in the hut purchased by A-8 was not liked by the deceased.

The hut in which A-1 was staying was damaged and deteriorated on account of rains as a result of which A-1

was staying at different place, temporarily, and upon season being concluded, A-1 and A-7 returned at the venue of offence in the morning around 9.00 a.m. on 3.9.90, the day of incident. A-1 was collecting roof-sheets in order to repair the damaged hut, which was, seriously, objected by injured Aminabibi and there was also exchange of hot words.

On the same day afternoon when deceased Anwar reached to his residence, he was told about the morning incident, which, unfortunately, took the toll of his life. In so far as the substance of the incident is concerned, it may be stated that, on that day, around 3.00 p.m. prosecution witness, Ibrahim, approached the deceased and both of them were going for getting some xerox copies for the purpose of passport of Ibrahim. At that time, deceased had forgotten to collect some documents. He, therefore, came home. It is the prosecution case that at that time, A-6, Khamarunisa, armed with axe, called the deceased to come out from his house. Immediately, thereafter, she inflicted axe blows on the door of the house. Other accused persons, thereafter, came near the hut of the deceased. No sooner deceased Anwar, came out, accused persons encircled the deceased with a view to translate and realise the common object of the unlawful assembly. They were armed with deadly weapons and A-7 and A-8 were in charge of supply of such weapons. Additionally, they instigated A-1 and A-6 for commission of the alleged offences.

Accused persons in pursuance of their common object of unlawful assembly, started assault by giving blows after blows on the person of the deceased and in course of this Aminabibi, with a view to save her son, intercepted and sustained serious injuries. As per the prosecution case, A-2, armed with knife inflicted blow which landed on the abdomen of injured Aminabibi. Accused persons fled away from the venue of offence after accomplishing the common object in finishing the deceased Anwar and making a murderous assault attempt on injured Aminabibi. The complaint came to be lodged by prosecution witness No.2 Mohd. Hanif Ibrahim Shaikh, sister's son of the deceased, immediately, after the incident occurred, at Shahpur Police Station, which came to be registered with C.R. No.I.254/90 and thus, got away the investigation.

Police Inspector, Investigating Officer, PW-16, N.P.Raijada was examined at Ex.63. After shifting the injured Aminabibi to hospital for treatment, he commenced investigation. A-1 and A-7 were produced by Head-constable Vinubhai in the Police Station and

physical condition of panchnama of both the accused persons was prepared and thereafter, they were arrested. It will be interesting to state, at this stage, that according to the case of the accused Nos.1 & 7, from the inception, is that they had gone to the place of offence along with A-2, only for the purpose of removing the roof-sheets from the hut. At that time, deceased Anvarhusen came there and he started showering abuses. So, they went to the Police chowky for the purpose of lodging complaint against the deceased and, in the meantime, complaint was recorded against deceased Anvarhusen and after the receipt of information by the Police, they were also detained in the police custody and subsequently, they were arrested in connection with the offence. Their case is that they were not present at the place of offence.

On 6th September, 1990, remaining accused persons came to be arrested by the Police. The IO made recovery and discovery of panchnama in respect of weapons. After the completion of the investigation and on receipt of the post mortem report and the report of the Forensic Science Laboratory and other documents, the IO submitted chargesheet against eight accused persons before the Metropolitan Magistrate, Ahmedabad, who, in turn, committed the case to the Sessions Court, where, charge was framed against the accused persons for the alleged offences punishable under section 147, 148, 302 read with 149 and 307 read with 149 and 34 of the IP Code, to which accused persons pleaded not guilty.

The defence of A-3 and A-4 is of total denial. They have tendered written statement before the Tribunal, whereas, A-1 and A-7, husband and wife, raised the defence that they were not present at the relevant time when the actual offence occurred. They had left the venue as deceased Anvarhusen had started quarrelling. In so far as the defence of A-2 is concerned, he has raised the plea of self-defence. He is an injured accused. According to his defence, he was assaulted by deceased Anvarhusen and Hanif after blurting wild abuses. It is also his defence that he was taken in grip by Anvarhusen and his associate Hanif and started beating him. He, therefore, tried to run away from the place, but he was again caught by deceased. The deceased was armed with knife and Hanif was armed with Gupti. According to the version of A-2, knife of Hanif had fallen down and, thereafter, he picked up the knife and in order to defend his body and with a view to keep deceased Anvarhusen, who was trying to inflict knife blow on A-2, away from him, he whirled the knife in self defence and inflicted blows

on the deceased, after getting relieved from the clutches of Hanif. Thereafter, Aminabibi intervened, who also sustained injuries due to infliction of knife blow given by Hanif, who, subsequently fled away from the venue of offence.

Defence of A-3 is of total denial. He is denied to have remained present, whereas, A-4, has stated that he was not present at the relevant time at the venue of offence, but on account of the past animosity with him and the fact that he had lodged a complaint against the deceased and his brother for assault on him with the help of knife and 'gupti', he was, wrongly, implicated. So far as other accused are concerned, their case is also of total denial.

[The prosecution, in support of its case, placed reliance on following 15 prosecution witnesses.

1. Mayankbhai Vinodbhai Raval, Ex.13.
2. Mohmadhanif Ibrahim Shaikh Ex.28.
3. Aminabibi Rahimbhai Ex.30.
4. Dr.Rameshchandra Bhagubhai Shah, Ex.33
5. Dr.Rathindra Balasaheb Deshmukh, Ex.37
6. Mastanabibi Saiyed Mahuddin, Ex.38-A
7. Lilaben Chandubhai, Ex.40.
8. Sanjay Pravinchandra Shah, Ex.43.
9. Mohmadsharif Noormohmad, Ex.45.
10. Ibrahim Kalubhai Shaikh, Ex.49.
11. Sehnazbibibi Anvarhusen, Ex.52.
12. Rameshbhai Kishanrao, Ex.55.
13. Kirti Himmatlal Shah, Ex.56.
14. Chhatrasinh Magansinh Vaghela, Ex.57.
15. Narendrasinh Pathubhai Raijada, Ex.63.

The prosecution has also placed reliance on documentary evidence to which reference will be made by us, hereinafter as and when required, at an appropriate juncture.]

The Trial Court, upon assessment of evidence and scrutiny of the facts and circumstances emerging from the record found only A-1 to A-4 guilty and acquitted A-5 to A-8, by giving benefit of doubt, holding that :

- (i) death of deceased Anvarhusen was homicidal;
- (ii) the prosecution has, successfully, proved that the accused persons of wrongful assembly, whose intention was to cause death of Anvarhusen and to attempt to cause death of Aminabibi and in

furtherance of that common object, committed riot under section 147 of IPC;

- (iii) the prosecution has proved without doubt that A-1 and A-2 were armed with knife and A-3 and A-4 were armed with gupti and they were members of unlawful assembly, along with others, and committed rioting with deadly weapons and thereby committed offence under section 148 of the IPC;
- (iv) the prosecution has failed to prove that A-5, A-6 and A-8 were members of said unlawful assembly.
- (v) the prosecution has established that A-2 as a member of the unlawful assembly and individually, voluntarily caused injuries on the abdomen of Aminabibi with gupti with an intention of causing death and if death would have taken place, he would have been held guilty of murder and thereby committed offence punishable under section 307 of the IPC.
- (vi) the prosecution has, successfully, proved that A-1 to A-4 were members of unlawful assembly, the common object of which was, also, to attempt to cause death of Aminabibi and in furtherance of the said common object, they attempted to cause murder of Aminabibi and therefore, they are held guilty under section 307 of IPC.

In short, the Trial Court found A-1 to A-4 guilty and convicted them under section 147, 148 and each of them is sentenced to R.I. for one year on each count and pay a fine of Rs.100/- each in default R.I. for 15 days respectively. A-1 to A-4 are also held guilty under section 302 read with section 149 of the IPC for causing death of Anvarhusen and sentenced to RI for life and a fine of Rs.500/- in default six months R.I. Again A-1 to A-4 are sentenced to RI for five years and a fine of Rs.500 in default R.I. for one month for attempt to cause death of Aminabibi. All the substantive sentences are ordered to run concurrently.

Since the entire impugned judgment of conviction and order of sentence is under challenge in this group of two appeals, we have heard the learned advocate for the accused and the learned Additional Public Prosecutor for the State, threadbare. Criminal Appeal No.510/92 is, at the instance of original accused Nos.1 to 4 under section 374 of the Code of Criminal Procedure, whereas, Criminal Appeal No.592/92 is at the instance of the State, against

the acquittal of A-5 to A-8, under section 378 of the Cr.P.C.

Homicidal death of deceased Anvarhusen is, as such, not in controversy. Otherwise also, the prosecution by leading the evidence of Medical Officer, Dr.R.B.Deshmukh, PW 5, examined, at Ex.37, who had conducted autopsy and also the post-mortem report at Ex.38, has proved beyond doubt that the deceased died a homicidal death. From the evidence on record of Dr.Deshmukh, and the post-mortem report, it is clear that the deceased had sustained, as many as, 31 external injuries, out of which 17 were serious injuries and 14 were skin deep injuries. The serious injuries were possible by sharp-cutting instrument like, muddamal knives. There were 10 internal injuries. Dr.Deshmukh has, clearly, testified that the injuries were anti mortem and were sufficient, in ordinary course of nature, to cause death and death had occurred within a spell of 24 hours before the post-mortem was carried out. It is also, clearly, stated in his evidence that injuries shown in column 17 in his post-mortem report Ex.38, injuries Nos.15 to 22 and 27 were corresponding to internal injuries No.1 to 8 and 10 and each one of them is, individually, sufficient in ordinary course of nature to cause death of a person. Those injuries, according to him, could have been caused by more than one assailant. It leaves, therefore, no manner of doubt that deceased Anvarhusen died a homicidal death.

Obviously, therefore, it would lead us to appreciation and examination of the evidence as to whether the death of Anvarhusen was caused by all or some of the accused persons, whether there was unlawful assembly, and if yes, whether all or some of the accused persons were members of such unlawful assembly. Again, whether the common object of such an unlawful assembly was to cause death of deceased Anvarhusen and to attempt to cause death of Aminabibi and whether in furtherance of such common object, offence under section 302 of IP Code is established and, again, in furtherance of said common object, the injury sustained by injured witness Aminabibi was the outcome of and in furtherance of such an unlawful assembly. In short, the question is as to whether the prosecution has, successfully, established the guilt of the accused persons for the offences they were charged with.

There are as many as, five eye witnesses, who are examined in support of the prosecution case. They are:

1. Mohmad Hanif Ibrahimbhai Shaikh, Ex.28.
2. Aminabibi Rahimbhai, Ex.30.
3. Ibrahim Kalubhai Shaikh, Ex.49.
4. Shahenzibi Anwarhusen, Ex.52.
5. Mastanaben Saiyed, 38-A.

There is, also, no dispute about the injuries sustained by injured prosecution witness No.3, Aminabibi Rahimbhai, who is the mother of the deceased. Injuries sustained by her, has been established in the evidence of Medical Officer, Dr.M.V.Raval, examined at Ex.13. He had examined injured Amina. Dr.R.V.Shah had examined A-2, Mohmad Latif, who was also injured in the incident. There is no dispute about the fact that A-2, Mohmad Latif had sustained serious injuries. It may be stated that some of the witnesses have turned hostile. Panchas of discovery panchnama have also not supported the prosecution case.

We have been taken through the entire testimonial collection and the documentary evidence, in course of the marathon submissions made before us. We have, also, heard the extensive and elaborate submissions of learned advocate for the accused and the learned APP for the State. We have, also, dispassionately, gone through the impugned judgment and order and the entire documentary evidence.

At this stage, let us, first, appreciate and evaluate the evidence so as to consider the merits of the acquittal appeal, at the instance of the State against four original accused persons, respondents in Criminal Appeal No.592/92. The reasons assigned by the Trial Court in support of its perception of A-5 to A-8 not guilty, after critical assessment and analysis of the prosecution evidence could not be shown by the learned APP to be erroneous, unjust or unreasonable. Moreover, nothing has been, successfully, spelt out, even from the evidence of eye witnesses, that there was participation of A-5 to A-8 in the crime.

Ordinarily, evidence of eye witnesses, if found, trustworthy and, more so in a case of injured eye witness, should not be thrown overboard. However, in view of the factual scenario emerging from the record of the present case and the inconsistent evidence of eye witnesses, in so far as the role and participation of A-5 to A-8, is concerned, considering the past animosity between the rival groups, the perception conceived by the Trial Court and the conclusion reached by him in granting acquittal to A-5 to A-8, by giving them benefit of doubt,

could not be said to be improper assessment of the evidence. It is a settled proposition of law that in an appeal when the appellate Court thinks that two views were possible, the view taken by the Trial Court in according acquittal has to be accepted and it cannot be reversed merely on the ground that a better view could have been taken, had the appellate Court analysed the evidence as a Trial Court. It is possible that, at times, a better view could be formulated and projected from the evidence in the appeal. Nonetheless, it could not constitute a substitute in place of the view taken by the Trial Court in granting the acquittal. No doubt, the appellate Court could, successfully, interfere exercising its power under section 378 of the Cr.P.C. if it could come to a positive conclusion that the view taken by the Trial Court or the conclusion reached by the Trial Court in granting acquittal to the accused persons was incomprehensible or was inconceivable and not otherwise. In totality of the facts, in so far as the merits of the acquittal appeal, at the instance of the State, under section 378 of the Cr.P.C. is concerned, neither it has been, successfully, shown that the view taken by the Trial Court is, totally, erroneous nor such view could have been conceived, nor it has been spelt out from the record that the perception reached by the Trial Court is not at all possible and probable. In absence of such a fact situation, the appellate Court, as per the celebrated proposition of law on this count, has to raise its hands in helplessness from reversing the order of acquittal when two views are possible and the view taken by the Trial Court is probable. The evidence of the eye-witnesses, in so far as, the role and participation of A-5 to A-8 is concerned is not only, inconsistent, incoherent, but insufficient to transfix their culpability without any shadow of doubt. With the result, the view taken by the Trial Court, being one of the views possible, granting acquittal to A-5 to A-8 is required to be affirmed and consequently, the appeal, at the instance of the State, Criminal Appeal No.592/92 under section 378 of the Cr.P.C. merits sole fate of dismissal.

Next, it brings into sharp focus the question of culpability of alleged complicity of original accused Nos.1 to 4, in so far as, conviction Appeal No.510/92, under section 374 of the Cr.P.C. is concerned. In so far as they are concerned, the evidence of injured eye-witness PW-3, Aminabibi, Ex.30 is quite creditworthy and dependable. No doubt, she is the mother of the deceased and, therefore, she could be characterised as an interested person. But the anxiety of the Court is to

see the reliability and not interestedness. On the contrary, close relations like, mother, would not be interested in involving stranger in place of real assailants. She has, in clear, term testified that A-2, Mohmedlatif, had inflicted fatal knife blow on the head of the deceased. It is also very clear from her evidence that A-1 and A-3 had also played active role, in order to save her son from being killed, she intercepted the attack on Anwar and paid the penalty by receiving knife blow upon her abdomen. It is clear from her evidence that A-3, Mohmad Nazir, was armed with Gupti and A-4 Mohmadarif was also armed with Gupti. No doubt, how many blows were given by whom has not been accounted for in her testimony. Nonetheless, it is quite clear and evident from her testimony that A-1 to A-4 not only that they were present, but were actively participating in the assault. This part of the testimony of injured eye-witness Aminabibi, PW-3, is quite creditworthy. Complicity in causing death of Anwar in the assault on the day of incident is established in her evidence and on that score her evidence runs like a knife going through the butter. The Trial Court's view, therefore, on this aspect has to be, confirmed. In so far as the homicidal death of deceased Anwar is concerned, her evidence is quite weighty, vetripotent and acceptable.

Not only that, her evidence is, substantially, corroborated by the other eye-witnesses. It may be mentioned that her evidence is, also, supported by FIR, which was lodged with possible promptness before the Shahpur Police Station. FIR is produced, at Ex.29. It was lodged by PW-2, Mohmadhanif, who is an eye witness and again who is the son of the sister of the deceased. PW-2, complainant, fully, corroborates the evidence of injured eye-witness PW-1, Aminabibi. Likewise, the prosecution witness No.11, Ibrahim Kalu, at Ex.49, also supports the prosecution case in so far as the culpability of A-1 to A-4 is concerned. He is an eye witness. There is no reason to disbelieve his version. Again, PW-12, another eye-witness, Shahnazbibi, at Ex.52, fully, corroborates the evidence of injured eye-witness as well as the complainant. She is the widow of the deceased and her presence at the venue of offence was quite natural. There is no reason to discard her testimony, which, significantly, supports the evidence of other eye witnesses and the prosecution version, in so far as the culpability of A-1 to A-4 is concerned. PW-6, Mustanbibi, is, also, an eye-witness. She is residing in the neighbourhood and her evidence, otherwise, is noticed to be reliable. Nothing has been, successfully, brought out, from her evidence, which would, in any way,

adversely, affect her credibility.

After having taken into account the evidence of the aforesaid eye-witnesses, coupled with the fact that the lodging of complaint without any loss of time, and the past animosity and the head-strong character of the deceased, with other evidence on record, we are convinced without any shadow of doubt, that A-1 to A-4 are the real assailants and they the authors of the homicidal death of deceased Anvar. Therefore, the submission that the A-1 to A-4 are not shown to be real assailants and are, wrongly, implicated by the prosecution on account of the past antagonism cannot be accepted.

However, the submissions raised on behalf of the accused persons, by learned advocate Mr. Budhbhatti, that A-1 to A-4 cannot be held guilty for offence punishable under section 302 of IP Code, in view of the fact situation emerging from the record of the present case, requires, dispassionate consideration and deep probe. In other words, the question which, now, crops up for consideration and adjudication is, as to whether, A-1 to A-4, though they are proved to be real assailants and resultant authors of the homicide of deceased Anvar, could be said to be the murderers. In order to examine this interesting, but difficult aspect, let us have, again, a close look into the testimonial collection.

The defence raised by accused persons is that the deceased was a head-strong, hardened, habitual offender and underworld don, without whose permission or approval, nothing could be carried out or moved in the area, in which he was residing, including the transfer of huts, and, as such, he was a big bully with past criminal record, who started the attack against A-2, Mohmadlatif, who had, admittedly, sustained serious injury on head and who was also kept in the hospital as an indoor patient, and in ordered to ward-off and to save himself and A-1, A-3 and A-4, who were also enimical with the deceased on account of the past quarrel and incident, wanted to save themselves from being attacked and killed. Thus, the plea of self-defence is propounded, not only first time before us in this appeal, but from the inception. However, the Trial Court has not accepted the plea of self-defence and that is the main grievance voiced and ventilated before us by learned advocate, Mr. Budhbhatti, for A-1 to A-4. The question, therefore, crops up for consideration, at this juncture, is as to whether, the plea of right of private defence was available to them, and if yes, whether the action of A-1 and conjoint actions of remaining three accused persons could be said

to be within the permissible parameters or exceeding the right of private defence.

In this connection, it will be expedient and interesting to refer to the relevant statutory provisions and celebrated principles. Section 97 in Chapter IV of the IP Code, provides a statutory right, resulting into a general exception. The right of private defence of the body and property. It reads as under:

"97. Every person has a right, subject to the restrictions contained in section 99 to defend --

First - His own body, and the body of any other person, against any offence affecting the human body;

Secondly -- The property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass."

Section 99 provides acts against which, there is no right of private defence. The important provision is made in section 100, which prescribes as to when the right of private defence of the body extends to causing death. In Chapter IV, general exceptions are provided from Section 76 to 106 of I.P.C. In order to avail and succeed in claiming the general exception, it is for the defence to establish about the existence of the situation or the condition laid down in Chapter IV, from section 76 to 106. No doubt, the degree and extent of proof in showing the existence and presence of one or more general exceptions is not as high as to establish the guilt of the accused persons. The standard, extent and the quality of proof in pleading and establishing, successfully, one or more general exceptions, as prescribed in Chapter IV of the IP Code is like proof in any other civil case of preponderance of probability unlike proving guilt beyond any reasonable doubt by the prosecution. Such principles are, extensively, explored, very well expounded and, therefore, we do not deem it expedient to articulate any further minor and meticulous details, more so in view of the elaborate exposition and proposition and valuable directions and guidelines heralded in *Vijayee Singh v. State of UP*, AIR 1990 SC 1459.

In our opinion, therefore, the onus of proof to claim exception under section 97 in Chapter IV of the IP Code is, successfully, discharged.

Nonetheless, following facts and aspects, which have emerged from the record have remained incontrovertible:

- (1) That there was strong antagonism between the deceased and accused party.
- (2) Deceased Anvarhusen was a head-strong person and he was in habit of threatening not only his neighbours but also the strangers, who tried to deal with land or huts in his area or neighbourhood.
- (3) Deceased was armed with big knife and it is noticed that he had employed the big knife with such a fury and ferocity, vengeance and vehemence that blunt portion of the big knife held by him was cut into two pieces, which is evident from the panchnama of scene of offence.
- (4) Deceased was a history-sheeter. He had a criminal record. He was also externed twice under the Bombay Police Act, by the competent authority.
- (5) Even on the day of incident, deceased Anvar along his nephew had picked up, unnecessary, quarrel and opened the attack on A-2, Mohmad Latif, by giving blow of knife on his head.
- (6) That the deceased and his brother had assaulted accused No.4, Mohmadarif, with Gupti and the said offence culminated into sessions case was pending at the time of the incident in question.
- (7) Accused No.2, Mohmad Latif had sustained serious injuries on his head. There was profuse bleeding and he was kept as an indoor patient for treatment and survived a major mishap.
- (8) Deceased was also prosecuted for attacking the house of no less than the then Home Minister of the State, Shri Jitu Shah.
- (9) Deceased was a strong person in terms of his physic and he was rated as best boxer of the State.

- (10) In the incident in question, the deceased had the audacity to attack with big knife on A-2, that too, on his vital part of the body, in broad daylight for a petty issue.
- (11) In the morning part of the day of incident, A-1 and A-7 wanted to renovate and replace the tin sheet, as their hut situated near the hut of the deceased was dismantled. It was not allowed to be done by the deceased and there was hot exchange of words.
- (12) A-1 to A-4 are brothers and they were, also, residing in the vicinity of the residence of the deceased.
- (13) Even as per the intimation received by PI Raijada, as admitted by him in his evidence, two groups were fighting as per the message received by the Police Constable, Manubhai, who in turn, informed PI, Shri Raijada.

Taking into consideration the facts and circumstances emerging from the record and the aforesaid aspects, we are of the clear opinion that the accused persons are entitled to general exception under section 97 in raising the plea of self-defence for the protection of body and property.

Obviously, therefore, now the question would arise as to whether the exercise of right of private defence by the accused persons in committing the death of deceased Anvarhusen would fall within the permissible parameter or they exceeded in it. In this context, let it be noted that although the deceased was a very head strong, hardened, habitual criminal with many antecedents, whether the accused persons were justified in retaliating in self-defence to the extent of killing the deceased is of paramount consideration. The deceased had sustained as many as 31 injuries, out of which 17 injuries were serious in nature. It appears that even after the deceased had fallen down, he was given various blows. Some serious blows were, also, given on the back. Of course, the deceased had employed big knife with vengeance and vehemence, furiously and ferociously and had given blow of knife on the head of Mohmadlatif, and there was, therefore, there would be an apprehension in the mind of the accused to exercise the right of private defence. However, the question which requires to be dealt with and decided is as to whether the apprehension which was cherished was such that the right of private

defence of the body could extend to causing death of the deceased. The circumstances are enumerated in section 100 of the IP Code as to when the right of private defence of the body extends to causing of death. Section 103 also prescribed as to when the right of private defence of property extends to causing death.

In our opinion, the accused persons exceeded the right of private defence. Now, the question for consideration is as to what is the nature of offence under which the accused persons could be punished. Since A-5 to A-8 have been exonerated from the charges levelled against them, obviously, there would not arise a question of offence having committed by them punishable under section 147 and 148 and, therefore, no question of vicarious liability under section 149 arise. For the constitution of unlawful assembly, as defined in section 141 would require five or more persons. If unlawful assembly is not established under section 141 of the IP Code, naturally there would not be any offence under section 146 for rioting. So there is no question of dealing with punishment under section 147 or for that purpose under section 148, rioting, armed with deadly weapons.

In our opinion, therefore, with due respect, the learned Trial Court Judge has failed to appreciate the relevant proposition of law. The conviction and resultant sentence under section 147, 148 and under section 302 read with section 149 would not arise, in view of the aforesaid discussions and the fact situation of the case and when there was no requisite element of constituting unlawful assembly, there was no question of formation of common object and the resultant vicarious liability under section 149. The conviction and the resultant sentence awarded by the Trial Court on these counts must, there, be quashed.

However, that is not the end. A-1 to A-4 have committed offence, but the question requiring consideration is as to what was the nature of offence committed by them.

At this stage, reference may be made to the provisions of sections 299 and 300 of the IP Code. Section 299 defines what is culpable homicide. Three explanations are, also, attached to section 299, whereas, section 300 defines what is murder. In this section, there are exceptions and, if the case falls in anyone of the exceptions, the nature of the offence would be culpable homicide not amounting to murder. It would, therefore, be interesting to refer, again, the facts of the present case for the appreciation of the nature of offence committed by the

accused persons. As we have held, in the light of the proved facts of the case that the accused persons were entitled to the protection of section 97 of IP Code, right of private defence. No doubt, in exercise of right of private defence, it cannot be contended that persons exercising such a right must weigh in a golden scale as to what was the extent of apprehension, meticulously. Nonetheless, as noticed earlier, in the peculiar facts and circumstances, the nature and proof of injuries sustained by the deceased, the type and gravity of injuries, we have found that the right of private defence was exceeded and in such a situation, Exception 2 of section 300 would govern the case. Exception 2 provides that culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right. In our opinion, therefore, the nature of offence committed is culpable homicide not amounting to murder punishable under section 304 Part I. Section 304 of IP Code provides punishable for culpable homicide not amounting to murder and the case is governed by part I of section 304. If the accused commits act, while exceeding the right of private defence by which the death is caused, either with the intention of causing death or with the intention of causing such bodily injury as was likely to cause death, then the accused would be guilty under section Part I of section 304 of the IP Code.

In so far as the offence under section 307 is concerned, we do not find any infirmity. Offence under section 307 is also established insofar as the murderous assault on mother of the deceased, eye-witness, Aminabibi is concerned.

Now, the question would arise, as to whether the accused persons, who, are four in number, could be held responsible for the offence under section 304 individually or read with section 34 of the IP Code when offence under section 149 is not proved. In so far as the common intention is concerned, it is an issue which requires to be judged from the set of surrounding circumstances and proved facts. Common intention could, hardly, be established by direct tangible evidence. It has to be presumed from the facts and circumstances. If circumstances so command and demand for constitution of common intention in the fact situation on a given case, obviously, even in absence of charge under section 34, the accused persons can be vicariously held liable, as in the present case.

In so far as the quantification of the sentence is concerned, learned advocate appearing for the accused and the learned Addl. Public Prosecutor, Mr Raval has been heard. The manner and mode in which the deceased was dealt with even after he fell down and the nature and proof of injuries sustained by him and considering the peculiar facts of the case, this is a fit and appropriate case, in our opinion to impose RI for 10 years and direct to pay fine of Rs.500/- and in default RI for one month for the offence punishable under section 304 Part I read with section 34 of the IP Code. In so far as punishment under section 307 is concerned, we maintain the order of the Trial Court as regards quantum as well as fine, with one modification that it shall be under section 307 read with section 34 instead of section 149 of the IP Code.

In the result, Criminal Appeal No.510/92 is, partly, allowed. Conviction of the accused Nos.1 to 4 under section 147 and 148 of the IP Code and the resultant sentence is quashed and set aside. Conviction and sentence under section 302 read with 149 for causing death of Anwarhusen is also quashed and set aside. Instead, accused Nos.1 to 4 are convicted under section 304 Part I read with section 34 of the IP Code and sentenced to undergo RI for ten years and to pay fine of Rs.500 (Rupees five hundred only) each and in default to undergo RI for one month. Accused Nos.1 to 4 are also held guilty under section 307 read with section 34 of the IPC, instead of section 307 read with section 149 of IPC but the quantum and order of sentence recorded by the Trial Court is confirmed, for causing injuries and attempt to cause death of Aminabibi. Both the substantive sentences are ordered to run concurrently.

Criminal Appeal No.592 of 1992 shall stand dismissed. Order with regard to muddamal is not disturbed.

Office is directed to transmit the writ immediately.

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(vjn)